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No. 83-220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DOYLE NATIONS AND MARIE NATIONS,
Petitioners,

v.

SUN OIL COMPANY (Delaware) and
SUN PRODUCTION COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE RESPONDENTS IN OPPOSITION

D. GARY SUTHERLAND *
JOSEPH A. O'CONNELL
HEIDELBERG, SUTHERLAND
AND MCKENZIE
Post Office Box Number 1070
Hattiesburg, Mississippi 39401
(601) 545-8180
Attorneys for Respondents

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF OF THE RESPONDENTS IN OPPOSITION

The respondents, Sun Oil Company (Delaware) and Sun Production Company,[1] pray that this Court will deny the petitioners' request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in its cause number 82-4041.

COUNTER-STATEMENT OF THE CASE

The United States District Court for the Southern District of Mississippi, William Harold Cox, J., did not ex-

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[1] Sun Company, Incorporated, is the parent corporation of the respondents, and their successor corporation is Sun Exploration and Production Company.

pressly collaterally estop the respondents from raising any affirmative defense. The trial court granted a partial summary judgment in favor of the petitioners on the question of liability. This partial summary judgment was based on an application of offensive collateral estoppel to the issue of whether Sun had been negligent. The Fifth Circuit concluded that the trial court had properly precluded Sun from relitigating the negligence issue.

The record in this case does not disclose whether Sun made any settlement offer to the petitioners, the circumstances under which such an offer was made or whether any such offer was communicated to the petitioners by their attorney.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

The Decision Below Does Not Raise the Question Presented in the Petition on the Scope of F.R.A.P. 28(j).

The petitioners' claim that that Fifth Circuit erred in allowing Sun to use F.R.A.P. 28(j) to brief an abandoned issue raises two separate contentions. The first is that Sun abandoned the statutory employer defense. The second is that F.R.A.P. 28(j) cannot be used to introduce an issue that was not previously briefed. Both of these contentions were made in the court below in the Nations' Petition for Rehearing. But the Fifth Circuit neither considered nor found it necessary to address the petitioners' second contention regarding the scope of F.R.A.P. 28(j), because it held (pet. app. B-13a) that Sun did not abandon the statutory employer defense. Since there was no abandoned issue, the question of whether Rule 28(j) could be used to raise such an issue no longer had any practical significance and, therefore, was not decided. Because the Court of Appeals did not pass upon the question, this Court has held that certiorari should not be granted to review it. *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328, 89 L.Ed. 273, 65 S.Ct. 297 (1945).

II.

The Decision Below Does Not Expressly Address the Question Presented in the Petition on Sun Having Abandoned the Statutory Employer Defense by Failing to Raise the Issue in Either Its Original or Reply Brief.

In the Petition for Rehearing which they filed in the court below, the Nations maintained that Sun abandoned the statutory employer defense, both by failing to present evidence supporting the defense at trial and by failing to assert the defense on appeal in either its original or reply brief. The Fifth Circuit ruled (pet. app. B-13a) that Sun's failure to adduce proof of the defense at trial did not constitute abandonment, because the trial court's order collaterally estopping relitigation of the liability question deprived it of the opportunity to do so. In their Petition for a Writ of Certiorari, the Nations have not controverted this ruling.

The Nations, however, do contend that the Fifth Circuit erred in allowing Sun to assert the statutory employer defense on appeal despite its failure to explicitly raise the issue in either its original or reply brief. However, the Fifth Circuit did not expressly address the question of whether Sun's failure to raise that affirmative defense in those briefs constituted abandonment. Instead, the Fifth Circuit necessarily implied in the opening paragraph of its opinion (pet. app. B-13a) that the Nations' argument on this point was one of the grounds urged on petition for rehearing which did not require review. Because the Court of Appeals did not pass upon the question, this Court has held that certiorari should not be granted to review it. *McCullough v. Kammerer Corp.*, 323 U.S. 327, 328, 89 L.Ed. 273, 65 S.Ct. 297 (1945).

III.

The Petitions' Contention That Sun's Failure To Raise the Statutory Employer Defense in Either the Appellants' Original or Reply Brief Constituted an Abandonment of the Issue Is Without Merit, Notwithstanding the Fifth Circuit's Failure to Expressly Address the Question.

As noted above, the Fifth Circuit did not expressly address the question of whether Sun's failure to raise the statutory employer defense in either its original or reply brief constituted an abandonment of the issue. The Fifth Circuit simply noted in its opinion (pet. app. B-13a) that the Nations' argument on this point did not require review. Although the Fifth Circuit did not specifically explain why a review of the argument was unnecessary, the reason is nevertheless clear.

In both its initial opinion (pet. app. A-3a) and the opinion on the Petition for Rehearing (pet. app. B-15a), the Fifth Circuit emphasizes, citing *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 649-50 n.5 (5th Cir. 1978), that it is obligated to apply the law current at the time of its decision. Accordingly, the Fifth Circuit was *Erie*-bound to apply the development in Mississippi's statutory employer defense which was announced in *Doubleday v. Boyd Construction Co.*, 418 So.2d 823 (Miss. 1982). *Doubleday* was not decided by the Mississippi Supreme Court, however, until August 25, 1982, exactly two months after Sun mailed its reply brief to the Clerk of the Fifth Circuit. Because Sun had already filed both its original and reply briefs long before the *Doubleday* decision clarified the statutory employer defenses' applicability to this case, it was unable to include an argument based on *Doubleday* in either of those briefs or to raise the issue any sooner than it did. Therefore, Sun could not have abandoned the statutory employer defense on appeal before having an opportunity to assert it properly. Once the opportunity arose, Sun had the option of asserting the defense either by following the procedures

set forth in F.R.A.P. 28(j) or by filing a supplemental brief after moving the Clerk of the Fifth Circuit for the appropriate authority, pursuant to the Fifth Circuit's Local Rule 10.1.11. Sun elected to utilize the procedures of F.R.A.P. 28(j). Under those procedures, the Nations were given the opportunity to respond in a similar manner and did, in fact, file a supplemental letter reply brief which the Fifth Circuit then reviewed and considered.

In their Petition for a Writ of Certiorari, the Nations cite three cases to support their contention that Sun abandoned the statutory employer defense on appeal by failing to raise the issue in either its original or reply brief: 1) *Harris v. Plastics Mfg. Co.*, 617 F.2d 438 (5th Cir. 1980); 2) *In re Municipal Bond Reporting Antitrust Lit.*, 627 F.2d 436 (5th Cir. 1980); and 3) *Simpson v. Union Oil Co. of California*, 411 F.2d 897 (9th Cir. 1969). Each of these cases is inapposite. They cover situations where, in spite of the absence of any impediment, there was either no proof supporting a claim or defense at trial or no discussion or argument supporting it in the appellate brief, even though there was an appropriate assignment of error in the brief and the legal authorities needed for developing the argument already existed. In this case, however, as noted, Sun had no opportunity at trial to prove any affirmative defense nor an opportunity on appeal to develop a substantial argument supporting the statutory employer defense until after the Mississippi Supreme Court handed down the *Doubleday* decision.

IV.

The Petitioners' Argument on the Scope of Rule 28(j) Is Without Merit, Notwithstanding The Fifth Circuit's Failure to Address the Issue.

The petitioners contend that F.R.A.P. 28(j) can only be used to bring the Court of Appeals' attention to recent decisions pertaining to a formal argument advanced in

either the appellant's original or reply brief. They insist that the rule cannot be used to notify the Court of Appeals of a recent development in the law, even when that development must be applied by the court in reaching its decision, if the legal contention in question has not been advanced previously in the briefs of the party asserting it.

Neither this Court nor any of the federal Circuit Courts of Appeals have ever attempted to define the scope of Rule 28(j), but it is clear that the petitioners' construction of the rule is unduly restrictive. The language of Rule 28(j) certainly does not create such limitations. A party to an appeal is permitted to identify the significance of recent decisions by making "a reference either to the page of the brief or to a point argued orally to which the citations pertain. . . ." Thus the rule itself draws a clear distinction between the points contained in a brief and any different and additional points made during oral argument, and permits both to be supplemented. The rule's language also permits a reference to any page of the brief and not just to those in the section of the brief containing the formal argument.

The language of Rule 28(j), therefore, clearly permits a party to bring the Court of Appeals' attention to a recent development in the law which gives new significance to factual points previously reviewed in its briefs, even if the claim or defense affected by that recent development was not formally argued. Any other interpretation of Rule 28(j) would be both illogical and impractical, given the fact that the Court of Appeals is obligated to apply such recent developments in the law if justice requires. No good reason exists, therefore, for preventing the parties to an appeal from using the simple and convenient procedures set forth in Rule 28(j) for such a purpose, especially since the rule also permits a response to be made by the opposing party. Requiring a party, desiring to notify the Court of Appeals of such a recent

development, to follow any other available procedures would only be more time consuming and expensive, but no more fair or effective.

V.

A Decision By This Court On The Scope of Rule 28(j) Would Be Premature and Should Await Developments in the Law by the Federal Circuit Courts of Appeals.

The scope of F.R.A.P. 28(j) is a matter of peculiar concern to the federal Circuit Courts of Appeals. Because none of the Courts of Appeals have attempted to define the scope of Rule 28(j), a decision by this Court on that issue would be premature and inappropriate. The Courts of Appeals should first be allowed to fashion judicial rules governing its use, since it is their operation which will be affected by those judicial rules. If a conflict arises, this Court can then resolve it.

VI.

The Alleged Conflicts Between the Decision Below and the Decisions Relied Upon by the Petitioners Do Not Exist and the Decision Below Is Easily Distinguishable On Its Peculiar Facts.

A. Alleged Conflict with *Chevron Oil Company v. Huson.*

The petitioners maintain that the Fifth Circuit's decision is in conflict with *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971). The basis for this alleged conflict is not any failure by the Fifth Circuit to apply *Chevron Oil Co.*'s tests for determining when judicial decisions should be retroactively applied. As the Fifth Circuit's opinion on the Petition for Rehearing discloses (pet. app. B-14a, 15a), these tests were methodically and meticulously applied in the court below, and the petitioners do not contend otherwise. Instead, the petitioners claim that those legal tests were misapplied to the facts of this case, producing a result at

variance with the one reached in *Chevron Oil Co.* in spite of the similarities between the two cases.

However, as the Fifth Circuit's opinion demonstrates, (pet. app. B-14a, 15a), the facts of this case are plainly distinguishable from those of *Chevron Oil Co. v. Huson*, and those factual differences readily account for the differing conclusions reached in the two decisions.

In *Chevron Oil Co. v. Huson*, this Court declined to apply retroactively one of its decisions, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 23 L.Ed 2d. 360, 89 S.Ct. 1835, holding that state law remedies, rather than admiralty law remedies, were applicable to actions based on the Outer Continental Shelf Lands Act. If it had retroactively applied *Rodrigue*, it would have found that the Louisiana statute of limitations barred the action. In deciding against retroactive application, this Court considered the three factors or tests for which *Chevron Oil Co.* is frequently cited. The Court first noted that *Rodrigue* unforeseeably overturned a long line of Fifth Circuit decisions holding that admirality law, including the doctrine of laches, governed actions under the Outer Continental Shelf Lands Act. 30 L.Ed 2d at 306, 44 U.S. at 107. It also found that retroactive application would produce substantial inequitable results, because it could not have been foreseen that a definite time limitation would be subsequently imposed. This made it unfair to punish a party for sleeping on his rights. 30 L.Ed 2d at 306-07, 404 U.S. at 107-08. Finally, the Court concluded that retroactive application would undermine one of the underlying purposes of the Lands Act, since the Act had been designed to afford familiar remedies and the change in the law produced by *Rodrigue* was completely unforeseeable. 30 L.Ed 2d at 306, 404 U.S. at 107-08.

By contrast, in the decision below the Fifth Circuit does not analyze judicial decisions determining whether state or admiralty law governs actions under the Outer Con-

tinental Shelf Lands Act, but interprets a line of decisions defining the scope of the statutory employer defense under Mississippi's workmen's compensation laws (pet. app. B-14a). In *Chevron Oil Co. v. Huson*, this Court held that *Rodrigue* overruled clear past precedent on which the litigants had relied, but the Fifth Circuit found (pet. app. B-14a) that *Doubleday v. Boyd Construction Co.*, 418 So.2d 823 (Miss. 1982), which held that prime contractors who require their subcontractors to provide workmen's compensation coverage are immune from suit, neither overruled clear past precedent nor decided an issue of first impression that was not clearly foreshadowed. The Fifth Circuit noted (pet. app. B-14a) that in deciding *Doubleday*, the Mississippi Supreme Court relied on two of its earlier cases, and that the *Doubleday* decision was also in accord with the leading hornbook on workmen's compensation law.

The Fifth Circuit also found that a retroactive application of the *Doubleday* decision would support the underlying purposes of Mississippi's statutory employer defense (pet. app. B-15a), since the purposes of the rule were to secure uniform compensation coverage and protect employers requiring subcontractors to obtain such insurance from tort liability, but would not produce injustice (pet. app. B-14a, 15a). The Nations claim that it would be unjust to deprive them of their damage award when the families of two coworkers injured in the same accident have recovered the jury verdicts previously awarded to them. But the Fifth Circuit noted (pet. app. B-15a) the Nations had freely chosen to delay the filing of their suit. Because they elected not to file suit with the coworkers, they had to accept the risk that the case would be decided under clearly foreshadowed, intervening legal precedents (pet. app. B-15a). Moreover, the intervention of the *Doubleday* decision did not deprive the Na-

tions of all compensation. It simply created the possibility that, if the trial court subsequently determined Sun satisfied the statutory employer criteria of *Doubleday*, the Nations would only be entitled to recover the workmen's compensation benefits which they had already been paid by the intervenor, Home Insurance Company.

Therefore, it is clear the decision below is not in conflict with *Chevron Oil Co. v. Huson*. By holding that retroactive application was proper, the Fifth Circuit did reach a different result from the one in *Chevron Oil Co.*, but the particular facts of this case alone account for that difference.

B. Alleged Conflict with *Parklane Hosiery Company v. Shore*.

The Fifth Circuit held (pet. app. B-15a, 16a) that the doctrine of collateral estoppel should not be applied offensively to preclude Sun from asserting the statutory employer defense. The petitioners claim this ruling not only conflicts with the decision of *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), but actually rejects *Parklane's* holding on the application of offensive collateral estoppel. Although the petitioners do not explain how the decision below rejects *Parklane* or where the alleged conflict lies, their contention is clearly erroneous.

Under federal collateral estoppel rules, there are three necessary criteria which must be satisfied before the doctrine will be imposed in a particular case: 1) the issue at stake must be identical to the one involved in the prior litigation; 2) the issue must have been actually litigated in the prior litigation; and 3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action.

Stovall v. Price Waterhouse Co., 652 F.2d 537, 540 (5th Cir. 1981); *Parklane Hosiery Company v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). But even though satisfying these three criteria is necessary for an application of collateral estoppel, that alone is never sufficient. The court must also evaluate the facts and circumstances of each particular case to determine whether the doctrine's application should be prevented by equitable considerations of fairness to the litigants. *Johnson v. United States*, 576 F.2d 606, 614 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981); *Rachal v. Hill*, 435 F.2d 59, 63 (5th Cir. 1970), *cert. denied*, 403 U.S. 904, 91 S.Ct. 2203, 29 L.Ed.2d 680 (1971); *Bruzewski v. United States*, 181 F.2d 419, 421 (3rd Cir.), *cert. denied*, 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950).

As it emerges in their Petition for a Writ of Certiorari, however, the Nations' position is that once a party meets the three criteria cited above, he becomes entitled to have collateral estoppel imposed as a matter of legal right. This position, however, is clearly erroneous, as the decisions cited above reveal. In the decision below (pet. app. B-15a, 16a), moreover, the Fifth Circuit notes that although res judicata is a doctrine of legal right, collateral estoppel is an equitable doctrine which can be applied in the court's discretion only when it is warranted by the legal and factual issues in the case. Citing *Parklane* (pet. app. B-15a, 16a), the Fifth Circuit also notes that the discretion vested in the courts to determine when offensive collateral estoppel should be applied is broad.

In evaluating the equitable considerations created by the legal and factual issues in this case (pet. app. B-16a), the Fifth Circuit concluded that it would be fundamentally unfair to preclude Sun from asserting the statutory employer defense. The Nations had chosen to de-

lay bringing their suit, and the result of this choice was that *Doubleday* resolved the central question of the case. Sun, on the other hand, would obviously be wronged by the entry of a final judgment which denied its rights under current and controlling Mississippi law.

Thus, the Fifth Circuit's refusal to collaterally estop Sun from asserting the statutory employer defense was plainly based on the peculiar facts of this case. Its decision is not in conflict with *Parklane*, but was actually decided in accordance with the principles of equitable discretion required by *Parklane*, 439 U.S. at 331, 58 L.Ed.2d at 562.

VII.

Reviewing the Decision Below Would Require The Court to Interpret State Law and Engage In Extensive Fact Canvassing.

As the preceding section of this brief demonstrates, the conflicts alleged by the petitioners turn on interpretations of both Mississippi law and the facts of the case. Their contention that the Fifth Circuit misapplied the retroactive application tests of *Chevron Oil Co. v. Huson* ultimately depends on an interpretation of whether *Doubleday* made a clear change in Mississippi law, as well as an interpretation of the underlying purposes of Miss. Code Ann. § 71-3-71 (1972). The resolution of this question also requires an extensive review of the facts of the case to determine whether retroactive application would produce substantial inequitable results.

The alleged conflict with *Parklane* consists of the Fifth Circuit's failure to collaterally estop Sun from raising the statutory employer defense. Because the Fifth Circuit is permitted to exercise broad discretion in determining whether the equitable considerations present in the case

warrant the application of collateral estoppel, the ultimate question to be resolved is whether the Fifth Circuit's evaluation of the case's equitable considerations constitute a clear abuse of discretion. The resolution of this ultimate question would require an extensive evaluation of the legal and factual issues in the case.

Therefore, in order to settle the questions presented by the petitioners on collateral estoppel and retroactive application of judicial decisions, this Court would have to construe Mississippi law and engage in extensive fact canvassing. The Court would also have to determine whether the Fifth Circuit properly exercised its broad discretion to deny the imposition of collateral estoppel. This Court has ruled, however, that these are not tasks to be served by a grant of certiorari. *Birtcher Corp. v. Diapulse Corp. of America*, 17 L.Ed.2d 43, 87 S.Ct. 6 (1966); *United States v. Johnson*, 268 U.S. 220, 227, 69 L.Ed.2d 925, 926 (1925); *Meccano v. John Wanamaker, Inc.*, 253 U.S. 136, 141, 64 L.Ed. 822, 826 (1920).

VIII.

The Result Below Was Fair.

Under current and controlling Mississippi law, the Nations' exclusive remedy consists of the benefits allowed under Mississippi's workmen's compensation laws. They have already received all of the compensation benefits to which they are entitled. It would not be unfair to the Nations, therefore, for *Doubleday* to be applied in this case. They knowingly accepted the risk of delaying their suit, and, in any event, are not entitled under current law to the jury award they seek to preserve. On the other hand, the failure to apply *Doubleday* would be grossly unfair to Sun. Such a failure would impose a burden on Sun for which it is not liable and from which it sought protection by requiring its subcontractors to obtain workmen's compensation coverage.

CONCLUSION

Not only are the reasons for granting certiorari advanced by the petitioners without merit, but there are many additional reasons, as explained above, for denying the issuance of such a writ in this case. Therefore, the respondents, Sun Oil Company (Delaware) and Sun Production Company, are entitled to have this Court deny the request of the petitioners, Doyle and Marie Nations, for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

D. GARY SUTHERLAND *
JOSEPH A. O'CONNELL
HEIDELBERG, SUTHERLAND
AND MCKENZIE
Post Office Box Number 1070
Hattiesburg, Mississippi 39401
(601) 545-8180
Attorneys for Respondents

* Counsel of Record

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